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No. 8[illegible]2

Supreme Court of the United States

OCTOBER TERM, 1960

SALYER LAND COMPANY,

Petitioner,

v.

THE COUNTY OF KINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Salyer Land Company, a California corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 20, 1960 (Appendix, p. 6a). The decision affirmed the judgment of the United States District Court for the Southern District of California, which had dismissed petitioner's complaint on the ground that federal jurisdiction of the cause was absent.

OPINIONS BELOW

The District Court's memorandum opinion and order is not reported. The opinion of the United States

Court of Appeals for the Ninth Circuit (Appendix, p. 1a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered as of December 20, 1960 (Appendix, p. 6a). The jurisdiction of this Court is invoked under U. S. C. § 1254(1).

THE QUESTION PRESENTED FOR REVIEW

1. The petitioner filed its complaint in the United States District Court, alleging that it had had to pay to the respondent County $27,182.61 as personal property taxes on 34,865 tons of barley it did not own. The complaint stated that title to the barley was in the Commodity Credit Corporation by virtue of certain instruments executed by petitioner pursuant to the federal statutes and regulations having reference to the price support program for agricultural commodities. The complaint further stated that there was a dispute between the plaintiff and the defendant with regard to the correct construction of these statutes and regulations, and that the action of the County in assessing and collecting the tax on property not owned by the petitioner worked a deprivation of due process and a denial of equal protection as guaranteed by the fourteenth amendment. The question presented for review is whether the United States District Court had jurisdiction of such a complaint, and of the cause initiated by it, under § 1331 of Title 28 of the United States Code.

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS WHICH THE CASE INVOLVES

Article III, § 2 of the Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority; . . ."

The fourteenth amendment provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1]

§ 1331 of Title 28 of the United States Code provides in pertinent part:

> "(a) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The Commodity Credit Corporation Charter Act provides in pertinent part:

> "For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibers (hereinafter collectively referred to as 'agricultural commodities'), and of facilitating the orderly distribution of agricul-

[1] U. S. Const. amend. XIV, § 1.

tural commodities, there is created a body corporate to be known as Commodity Credit Corporation (hereinafter referred to as the 'Corporation'), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture (hereinafter referred to as the 'Secretary')."[2]

* * *

"The Corporation—

* * *

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts, or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements."[3]

* * *

"In the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to the Government Corporation Control Act, the Corporation is authorized to use its general powers only to—

(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations."[4]

The 1957 C. C. C. Grain Price Support Bulletin 1,[5] as promulgated by the Department of Agriculture,

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[2] 62 Stat. 1070, (1948), as amended, 63 Stat. 154 (1949), 15 U.S.C. § 714.

[3] 15 U.S.C. § 714b (g).

[4] 15 U.S.C. § 714c.

[5] 22 Fed. Reg. 2321 (1957).

[hereinafter cited as Grain Bulletin], provides in pertinent part:

"Part 421—Grains and Related Commodities

"Subpart—General Provisions for 1957—Crop Price Support Programs for Grains and Related Commodities

"This bulletin (hereinafter called subpart) contains regulations of a general nature which will be applicable with respect to 1957 price support programs for certain grains and other commodities for which the Secretary of Agriculture makes price support available through the Commodity Credit Corporation and the Commodity Stabilization Service (referred to in this subpart and supplements hereto as CCC and CSS respectively).

"§ 421.2202 Commodities covered by this subpart. The provisions of this subpart shall apply to 1957 price support programs for barley, corn, dry edible beans, grain, sorghums, flaxseed (except direct purchases), oats, rice, rye, soybeans, wheat, and any other 1957 price support program for which a commodity supplement to this subpart is issued.

"§ 421.2207 Applicable forms and requirements— * * *

"(b) Warehouse-storage loans. Applicable forms shall consist of the Producer's Note and Loan Agreement and such other forms and documents as may be required by CCC.

"§ 421.2212 Transfer of producer's interest—

"(a) Warehouse-storage loans. The producer shall not transfer either his remaining interest in or his right to redeem a commodity pledged as security for a warehouse-storage loan, nor shall anyone acquire such interest or right.

"§ 421.2217 Release of the commodity under loan.

"A producer may at any time obtain release of the commodity remaining under loan by paying to the holder of the note and supplemental loan agreement or note and loan agreement the principal amount thereof, plus charges and accrued interest.

"§ 421.2219 * * *

"If the commodity is pooled, the producer has no right of redemption after the date the pool is established, but shall share ratably in any overplus remaining upon liquidation of the pool. CCC shall have the right to treat the pooled commodity as a reserve supply to be marketed under such sales policies as CCC determines will promote orderly marketing, protect the interests of producers and consumers, and not unduly impair the market for the current crop of the commodity even though part or all of such pooled commodity is disposed of under such policies at prices less than the current domestic price for such commodity. Any sum due the producer from the sale of the commodity or from an insurance indemnity paid on the commodity, or any ratable share resulting from the liquidation of a pool, after deducting the amount of the note, interest, and charges, shall be payable only to the producer without right of assignment by him."

The 1957 CCC Grain Price Support Bulletin 1, Supplement 1, Barley [hereinafter cited as Barley Supplement] [6] provides in pertinent part:

"Part 421—Grains and Related Commodities

"Subpart—1957—Crop Barley Loan and Purchase Agreement Program

"A price support program has been announced for the 1957-crop of barley. The 1957 C. C. C. Grain Price Support Bulletin 1 (22 F. R. 2321),

[6] 22 Fed. Reg. 2973 (1957).

issued by the Commodity Credit Corporation and containing the regulations of a general nature with respect to price support operations for certain grains and other commodities produced in 1957 is supplemented as follows:

* * *

"Authority: §§ 421.2276 to 421.2286 issued under sec. 4, 62 Stat. 1070 as amended; 15 U. S. C. 714b. Interpret or apply sec. 5, 62 Stat. 1072, sec. 401, 63 Stat. 1054, sec. 308, 70 Stat. 206, 15 U. S. C. 714, 7 U. S. C. 1421, 1442.

"§ 421.2276 Purpose. Sections 421.2276 to 421.2286 state additional specific regulations which, together with the general regulations contained in the 1957 C. C. C. Grain Price Support Bulletin 1 (§§ 421.2201 to 421.2221), apply to loans and purchase agreements under the 1957-Crop Barley Price Support Program.

"§ 421.2277 Availability of price support—

(a) Method of support. Price support will be available through farm-storage and warehouse-storage loans and through purchase agreements.

* * *

(d) When to apply. Loans and purchase agreements will be available from the time of harvest through January 31, 1958, and the applicable documents must be signed by the producer and delivered to the office of the county committee not later than such date. Applicable documents include the Producer's Note and Loan Agreement for warehouse-storage loans, the Producer's Note and Supplemental Loan Agreement and the Commodity Chattel Mortgage for farm-storage loans, and the Purchase Agreement for purchase agreements.

"§ 421.2279 Warehouse receipts. Warehouse receipts representing barley in approved warehouse-storage to be placed under a loan or delivered under a purchase agreement, must meet the following requirements of this section:

(a) Warehouse receipts must be issued in the name of the producer, must be properly endorsed in blank so as to vest title in the holder, and must be receipts issued by a warehouse approved by CCC under the Uniform Grain Storage Agreement which indicate that the barley is insured, or must be receipts issued on warehouses operated by Eastern common carriers under tariffs approved by the Interstate Commerce Commission for which custodian agreements are in effect which indicate that the barley is insured. . . .

"§ 421.2282 Maturity of loans. Loans mature on demand but not later than February 28, 1958, in the States of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia, not later than March 10, 1958 in Arizona and California, and not later than April 30, 1958 in all other States. The maturity date for a loan shall be the maturity date for the State where the barley is stored."

STATEMENT OF THE CASE[1]

Barley is a winter crop, harvested in the spring and summer. In 1957 petitioner harvested 34,865 tons of barley on its lands in Kings County, California. Petitioner did not itself keep this barley, nor did it market it through regular grain trade channels. Instead petitioner entered into a number of agreements with the Commodity Credit Corporation covering the whole 34,865 tons, and it is this which has given rise to the present controversy. The basic instruments are a

[1] The facts are no way in dispute. The case was submitted to the District Court for decision on an "Agreed Statement of Facts." [Record, p. 25]

series of "Producer's Notes and Loan Agreements",[8] each of which was on a printed form prepared by the Department of Agriculture.[9]

Petitioner, following harvest, had stored the barley in a public warehouse, receiving warehouse receipts therefor. These receipts were endorsed in blank and delivered to the Commodity Credit Corporation.[10] These events happened in 1957.

In February of 1958 an official of the Department of Agriculture wrote to petitioner as follows:

> "Subject: 1957 Crop Barley-Notice of Maturity--93-016-24B (Barley)
>
> "This is to notify you that you have until March 10, 1958, to either repay or deliver the commodity

---

[8] A specimen of these instruments will be found on pages 33 and 34 of the Record. Although designated as a loan, payment is not required. [9(a). "Any holder of the producer's note shall look solely to the pledged commodity for satisfaction of such note, plus charges and interest . . . ."] Both the regulations and the instrument restrict the right of transfer of the producer's remaining interest. See Grain Bulletin, § 421.2212, supra, p. 5. Paragraph (h) of the instrument is as follows: "The Commodity Credit Corporation may prescribe such restrictions or limitations upon the right of the producer to assign, sell, or transfer either his right to redeem or his remaining interest in the pledged commodity as it determines are necessary in order to effectuate the purposes of the loan program pursuant to which this loan is made available."

[9] The regulations specifically require use of the Producer's Note and Loan Agreement. See § 421.2207, Grain Bulletin, quoted supra, p. 5; Barley Supplement, § 421.2277(d), quoted supra, p. 7.

[10] Barley Bulletin, § 421.2279, quoted supra, p. 7, covers the form of the warehouse receipts, including the requirement that they "be properly endorsed in blank so as to vest title in the holder."

which you have in loan to Commodity Credit Corporation."[11]

A card was enclosed with this notice, requesting petitioner to indicate whether it would redeem the barley. That card was returned during the month of February, 1958, with notation thereon that petitioner would not redeem.[12] On the same day that the card was returned, petitioner executed and mailed to the Community Credit Corporation a writing containing the following language:

> "This Instrument, made this the 24th day of February, 1958, by Salyer Land Company:
>
> Witnesseth:
>
> That the said Salyer Land Company doth waive, release, and quit-claim absolutely and without qualification of any kind, all right, title, interest, and estate, of whatever kind and character it has had or now has, in and to barley of whatever kind or description and wherever situate, now held in storage in the County of Kings, State of California, where warehouse receipts covering said barley have been transferred to the Commodity Credit Corporation, a Federal Corporation, to be held as security for non-recourse loans to the said Salyer Land Company.
>
> "It is the purpose and intent of this instrument to divest the said Salyer Land Company completely and absolutely of any and all right, title, interest, or estate in or to said barley, including but not limited to any right of redemption, and to waive, release, and forever quit-claim any and all

[11] Record, p. 39.

[12] Record, p. 40.

such right, title, interest, or estate to the said Commodity Credit Corporation.

"Dated this the 24th day of February, 1958.

SALYER LAND COMPANY."[13]

On March 4, 1958 the Chairman of the California Agricultural Stabilization and Conservation Committee, U. S. Department of Agriculture, replied:

"Dear Mr. Salyer:

"The letters and attached quit-claim notices, pertaining to grain under loan to Commodity Credit Corporation, have been forwarded to this office for consideration.

* * *

"The Price Support Bulletin provides that 1957 barley loans in California mature on March 10, 1958, or on demand.

"No demand notice has been issued in connection with the loans specified in your communications, and you are therefore without authority to dispose of the subject grain without first having redeemed it in full."[14]

The first Monday in March is the tax date in California. The tax date came on March 3rd in 1958, after petitioner had already notified the Government that it would not redeem the barley, after it had waived, released, and quitclaimed whatever right, title or interest it had in the barley and only 7 days before the barley was to be taken over by the Commodity Credit Corporation in any event. Nevertheless, petitioner was assessed and had to pay a tax of $27,182.61 to re-

[13] Record, p. 40. The letter forwarding the instrument may be found at Record, pa 41.

[14] Record, p. 43.

spondent County on the ground that it owned the barley on March 3rd. Petitioner paid the tax under protest, filed a claim before defendant County's Board of Supervisors for its refund, and when this was denied instituted suit therefor in the United States District Court for the Southern District of California.[15]

Petitioner's complaint set forth, with the brevity and plainness enjoined by Rule 8 of the Federal Rules, the facts hereinabove stated. The portions of the complaint material to jurisdiction were as follows:

"I.

"That this action arises under the Constitution of the United States, Amendment XIV, under Title 15, §§ 714 U.S.C. ff., and the other statutes of the United States having reference to the support of prices of agricultural commodities by the Commodity Credit Corporation, and under the regulations promulgated by the Secretary of Agriculture pursuant thereto. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

* * *

"VI.

"That on the first Monday in March, 1958, the plaintiff did not own, claim, possess or control the the said 34,865 tons of barley, or any part thereof; that, on the contrary, the full title to said barley was then and there vested in the said Commodity Credit Corporation.

* * *

"IX.

"That the action of the said County of Kings in assessing the said tax on property not owned

[15] There has been no suggestion in this case that respondent County is immune from suit under the Eleventh Amendment *Lincoln County v. Luning*, 133 U. S. 529 (1890).

by plaintiff and collecting said tax from the plaintiff, has deprived the plaintiff of due process of law, as guaranteed by the United States Constitution, Amendment XIV; that said action on the part of defendant has deprived the plaintiff of the equal protection of the laws as guaranteed by the United States Constitution, Amendment XIV; that a correct construction of the statutes of the United States having reference to the support of the prices of agricultural commodities by the Commodity Credit Corporation, and of the regulations promulgated by the Secretary of Agriculture pursuant thereto, requires the conclusion that the plaintiff retained no taxable interest in the said 34,865 tons of barley; that the defendant disputes and contends against this construction, and has taken and now takes the position that its actions with regard to said assessment are not violative of the said Constitutional provisions, and that despite the said federal statutes and the said federal regulations, the plaintiff owned a taxable interest in the said barley." [16]

In due course the respondent County filed its answer on the merits.[17] Thereafter a pretrial conference was held at which it was determined that the issues were solely legal. The Court accordingly directed counsel for plaintiff and defendant to prepare an agreed statement of facts and to submit briefs, follow-

[16] The complaint is set forth in full on pages 3-8 of the Record. The statement that a dispute existed between petitioner and the respondent County as to the correct construction of federal law is of course to be contrasted with the cases where "an anticipated *defense* [is] derived from federal law." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 673 (1950). It is the complainant's case, rather than the defendant's, which here is grounded in federal law.

[17] Record, p. 14.

ing which the case would stand submitted for decision on the merits.[18]

At that pretrial conference the United States District Court's jurisdiction was discussed, as follows:

> "[The Court]: What is the question of law involved here?
>
> "Mr. Greer [Counsel for petitioner] Very briefly, your Honor, it is whether or not barley and, for that matter, other commodities which are placed in a Government loan, a loan program of the Commodity Credit Corporation, are sufficiently the property of the original producer, the farmer, to be taxed by one of the counties of California.
>
> "The farmer, in this case the Salyer Land Company, takes the position that it doesn't retain [a] taxable position. It takes the position that the legal relationship between the farmer and the Commodity Credit Corporation is a sale and not a loan transaction at all; that some of the terminology of a loan is used but that the label actually doesn't indicate the substance of the transaction at all; that it has no right to reacquire the barley or other agricultural commodity pledged, and that it doesn't own, claim, possess or control—those are the four key words out of Section 405 of the Revenue and Taxation Code—it doesn't own, claim, possess or control any interest in barley sufficient to be taxed.

[18] In its opinion the Court of Appeals has assumed that the order directing the filing of an agreed statement of facts was because of "apparent misgivings as to the sufficiency of the facts then pleaded" and that the final decision came while "making arrangements for the trial on the merits . . . ." Record, p. 78. This is an inadvertent error. The pretrial order expressly stated that it appeared to the Court "that no issues of fact are presented by this litigation," and directed that the cause stand submitted for final decision upon the agreed statement of facts and the parties' briefs.

"The Court: How do we get jurisdiction?

"Mr. Greer: A federal question is presented in three different ways, your Honor:

"(1) If the Salyer Land Company doesn't own, claim, possess or control this property and Kings County assesses it and insists on collecting a tax, we allege that we have been deprived of the equal protection of the laws and of due process of the law, because Kings County doesn't collect taxes from any other properties unless they are owned, claimed, possessed or controlled.

"(2) The court is going to have to construe a bunch of federal statutes, primarily those statutes relating to the Commodity Credit Corporation, which are pleaded in our complaint, Sections 714 and the following sections of Title 15 of the United States Code, which relate to the powers of the Commodity Credit Corporation and relate to what it does and the interests it acquires. There is a federal question presented by the interpretation of Section 714 of Title 15, the construction of which, if it is favorable to the plaintiff, will redound to the plaintiff's advantage; if it is unfavorable to the plaintiff it will redound against the plaintiff's advantage which, as we read the leading Supreme Court case on this point, Bell v. Hood, result in our having a federal question.

"[3] Then there are a large number of federal regulations which will have to be construed and the case is, in many different ways, a proper one for federal jurisdiction.

"The Court: You also will have to construe state laws too, will you not?

"Mr. Leach [Counsel for respondent County]: Yes.

"Mr. Greer: One of the federal statutes involved states, in substance, that all state laws to the contrary notwithstanding—I am not quoting it verbatim, but I am quoting it in substance—

shall not prevail in a construction of the various agreements which the Commodity Credit Corporation makes with the producer, that that is to be controlled by federal law.

"The Court: The reason I am suggesting this question of jurisdiction is because the Ninth Circuit has repeatedly held that the first thing in every case is to see whether or not the court has jurisdiction.

"Mr. Greer: We meet that at the threshold and, your Honor, that point was considered by us very exhaustively.

"The Court: Whether the parties raise it or whether they do not, the Ninth Circuit will.

"Mr. Greer: That is right. We considered it very thoroughly before we invoked this court's jurisdiction. This whole question . . . [is] permeated [with] federal law and can't be decided without construing federal statutes.

"The Court: Of course the states are authorized to construe federal statutes, too.

"Mr. Leach: We have nothing on file, your Honor, attacking the jurisdiction. We did give it consideration.

"The Court: As I say, the Ninth Circuit has held that regardless of that they can raise it. The leading case is Cheyne v. Santa Fe where the parties went to judgment, took an appeal, nobody raised it (it was a removed case, however, which is different here), they took an appeal and the first thing they did was to look at the question of jurisdiction and sent it back and ordered it removed.

"Mr. Greer: I think the case that we would principally rely on would be Bell v. Hood at 327 U. S., your Honor.

"The Court: Yes. This case I mentioned, if you are interested, Cheyne v. Santa Fe, is 125 F. 2d. It was, as I say, a removal case and the plaintiff had sought to invoke the jurisdiction of the state court, and the Supreme Court has held that

they can do so even though it involves a construction of the federal statute, but here you are here originally.

"You say Bell v. Hood?

"Mr. Greer: Yes, sir. 327 U. S. 678.

"The Court: That was against agents of the Federal Government.

"Mr. Greer: Yes, sir. The plaintiff claimed that he had been deprived of his rights and the key sentence, if I can quote it in substance—I don't have the citation before me—is whenever a party comes into court, into a federal court, saying that under one construction of the statute or of a federal statute his rights have been advantaged and under another construction his rights will be derogated [sic] he has stated a federal question.

"The Court: This involved the Fourth and Fifth Amendments which you make reference to.

(Examining citation.)

"Mr. Greer: Your Honor, the essential texture of this case as a federal question case is this: There are a series of federal statutes creating the Commodity Credit Corporation and providing for the support of commodity prices through the operation of that federal corporation, the Commodity Credit Corporation.

"Regulations are put out interpreting those statutes and providing, in the form as promulgated by the Secretary of Agriculture, as to the types of papers which will be executed by the producers. Those statutes and those regulations together, according to our construction, provide that title to agricultural products . . . [is] to be vested in the CCC.

"As a matter of fact, one of the regulations of the Secretary of Agriculture itself says that warehouse receipts shall be executed in such form and endorsed in such form as 'to vest title in the Commodity Credit Corporation.'"

"I don't mean to be arguing the merits of the case, I don't mean to anticipate that; I merely wish to indicate to the court the extent to which this is a federal problem.

"The Court: Well, there is no dispute concerning the applicability of the laws of the State of California or their interpretation in the event that this federal question is decided against you, is there?

"Mr. Greer: I don't know of any questions of state law.

"Mr. Leach: You mean state statutes?

"The Court: That is right. In other words, suppose the case is decided against the plaintiff here, there is no question concerning—

"Mr. Greer: California law as such?

"The Court: —concerning the California law?

"Mr. Greer: No. The basic California law applicable is Section 405 of the Revenue and Taxation Code, which is a very short statute, which provides that:

> "'Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing or controlling it at twelve o'clock meridian of the first Monday in March.'

"I don't think there is any question as to what that statute means.

"The questions involved are the bite of the federal statutes and the federal regulations and whether or not pursuant to the federal statutes and federal regulations title has so passed to a federal instrumentality, the Commodity Credit Corporation, as to leave no title in the farmer, in the producer, to come within the ambit of Section 405 of the Revenue and Taxation Code.

"The Court: Then am I correct in saying that if the federal statute and regulations upon which you rely are decided against you there is no state question left?

"Mr. Greer: None which I am at present advised.

"The Court: Is that your view, too?

"Mr. Leach: I guess so, too.

"The Court: Then it would appear that this court does have jurisdiction, if that is the case.

"Do you want to have the reporter write this up so you will have a record that the question of jurisdiction was discussed?

"Mr. Greer: I think for the record it would probably be advisable.

"The Court: I think so, too. Very well."[19]

Counsel thereafter agreed upon and filed the agreed statement of facts, with the several documents attached, on July 10, 1959. The following month, pursuant to the pretrial order, the petitioner filed its brief on the merits. In October the defendant County filed its brief and for the first time, in a case which had been pending since December 4, 1958, questioned the jurisdiction of the District Court.

Following completion of the briefing the cause stood submitted for decision on the merits. On November 20, 1959, the District Court, through another of its judges, Hon. William C. Mathes, entered an order dismissing the entire case for want of jurisdiction. The brief memorandum of opinion filed by Judge Mathes stated that there "appears no claim or cause of action asserted in the complaint which 'arises under the Constitution, laws or treaties of the United States. . . .'", but that instead "plaintiff asserts a claim arising under State law and within the general jurisdiction of the

[19] Record, pages 64-70. The pretrial conference was held before Chief Judge Peirson M. Hall.

State courts".[20] From that decision the plaintiff prosecuted its appeal to the Ninth Circuit and now applies to this Court for certiorari.

ARGUMENT

1. THE COMPLAINT STATED A CASE WITHIN THE FEDERAL QUESTION JURISDICTION OF THE UNITED STATES DISTRICT COURT.

The defendant County has exacted a tax of $27,182.61 from petitioner on 34,865 tons of barley which petitioner claims it did not own. Petitioner says that it did not own this barley because, under the federal statutes and regulations having relevance to Commodity Credit Corporation transactions, title was solely in the Commodity Credit Corporation. Petitioner further says that the exaction of a tax from one having no ownership in the property assessed is a deprivation of due process and a denial of the equal protection of the laws.

The Court of Appeals is in agreement with petitioner as to the issue presented:

> "The oft repeated and main objection of appellant has been and is that on the tax levy date is was not the owner of the taxed barley. Thereby is presented the *one and only ultimate question* to be decided in any Court, whether state or federal."[21] [Emphasis added].

[20] Judge Mathes' memorandum of opinion and order may be found at pages 60-63 of the Record.

[21] Record, p. 80. This statement in the Court of Appeals' opinion is difficult to reconcile with its earlier statement that "the federal law . . . here concerns not the validity or applicability of the state tax as to barley owners but only the *incidental* question whether the appellant itself was on the tax levy date the owner of the barley taxed against appellant under the state law." Record, p. 73 [Emphasis added.]

The respondent County has argued throughout that the construction of the documents entered into between petitioner and the Commodity Credit Corporation is to be determined by the state law of California:

> *"The interpretation of such contracts is, of course, not a federal issue.* Contracts between private parties and federal governmental agencies are commonly examined and interpreted by state courts." [Respondent County's brief in the Court of Appeals, page 8.]
>
> "The issue thus raised calls for an analysis of the appellant's interest in the subject barley to determine whether, under the law of the State of California, it was properly taxable to plaintiff. *This question is not federal in nature.*" [Respondent County's brief in the Court of Appeals, page 5.]

At the threshold of the Commodity Credit Corporation Charter Act the Congress provided that:

> "The Corporation—
>
> * * * (g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. *State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto* to the extent that such contracts or agreements provide that such laws or rules shall not be applicable,[22] or to the extent that

[22] There is no such specific provision in the documents herein involved, unless § 9 (f) of the Producer's Note and Loan Agreement should be so construed:

> "The producer understands and agrees that the making of loans pursuant to this Producer's Note and Loan Agreement and the pooling of the pledged commodity and the liquidation of such pool pursuant to subsections (c) and (e) hereof constitute integral parts of a Federal program . . . ."

> such laws or rules are inconsistent with such contracts or agreements."

We are thus admonished at the outset by the Congress that contracts into which the Commodity Credit Corporation enters may not be governed by State law; if the contract be inconsistent with State law or regulations, it is not the contract, but State law, which is to yield. The Congress' intent that contracts of the Commodity Credit Corporation should have uniform interpretation is thus clear. The Secretary of Agriculture, in his statement respecting adoption of this legislation in 1948, named such uniformity as the reason for this section of the statute:

> "Subsection (g) further provides that State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements. This provision will facilitate the use by the Corporation in carrying out its Nation-wide programs, of standardized procedures and agreements."[23]

The decision sought to be reviewed dismisses this suitor from the federal courts, telling him that these issues should have been presented to the state courts of California for adjudication. The courts of California have already passed on a similar case, see *Burhans* v. *County of Kern*, 338 P. 2d 546 (Cal. App. 1959), in which a Commodity Credit Corporation Producer's

[23] The committee reports on the Commodity Credit Corporation Charter Act in both the Senate and the House are at page 2138 of U. S. Code Congressional Service, Eightieth Congress, 2d Session.

Note and Loan Agreement was construed, according to the state law of California, to create a loan. The document has been construed in Indiana, see *Thompson* v. *Arnold*, 147 N.E. 2d 907 (Ind. 1958), to create a loan only, by the law of that state. The Supreme Court of Ohio, see *Maddox* v. *Bowers*, 149 N.E. 2d 248 (Ohio 1958), has held that the instrument does not create a loan, but instead a bill of sale.

The Congressional purpose is thus thwarted, and forms of contract used uniformly by the Commodity Credit Corporation throughout the United States are receiving diverse interpretations under diverse State views of the law, although the statute creating the Commodity Credit Corporation was enacted with express intent that such contracts should receive uniform interpretation, and should not be governed by State law.

The Commodity Credit Corporation, being a wholly owned government corporation, has a substantial identity with the United States. As this Court has recently stated, "Commodity is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds."[24] The late Judge Lemmon of the Ninth Circuit, while sitting on the District bench, accordingly held contracts with the Commodity Credit Corporation to be "in fact and in law, with the Government of the United States," *U. S.* v. *Turlock Dehydrating and Packing Co.*, 116 F. Supp. 822, 828 (N.D. Cal. 1953), and that accordingly the rule of *U. S.* v. *Allegheny County*, 322 U.S. 174, 182 (1944) applies:

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[24] *Rainwater* v. *United States*, 356 U. S. 590 (1957), in which a false claim against the Commodity Credit Corporation was held to be a "claim against the Government of the United States."

"The validity and construction of contracts through which the United States is exercising its constitutional functions, *their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law* not controlled by the law of any state." [Emphasis added.]*

* *Allegheny* was very similar to the case at bar in several respects. There, as here, the County sought to tax property which the taxpayer claimed to be the property of the federal government. The National Institute of Municipal Law Officers, appearing in this Court *amicus curiae*, argued, as does the County in this case, that state law controlled. It should not be overlooked that in *Allegheny* the contracts involved were between only the government and the private party concerned. Contrast the case at bar, where, as the Producer's Note and Loan Agreement itself states, "(f) The producer understands and agrees that the making of loans pursuant to this Producer's Note and Loan Agreement and the pooling of the pledged commodity and the liquidation of such pool pursuant to subsections (e) and (e) hereof *constitute integral parts of a Federal program. . . .*" [Record, p. 34; emphasis added.]

The decision of the Court of Appeals in the case at bar cannot be reconciled with *Allegheny*, and it may fairly be stated that the Court of Appeals has thereby decided a federal question in a way in conflict with applicable decisions of this Court.

The documents involved here spring directly from federal regulations promulgated by the Department of Agriculture.[25] The basic document, the Producer's

[25] Grain Bulletin, 22 Fed. Reg. 2321 (1957), states its authority as follows:

"Authority: §§ 421.2201 to 421.2221 issued under sec. 4, 62 Stat. 1070, as amended; 15 U.S.C. 714b. Interpret or apply sec. 5, 62 Stat. 1072, secs. 101, 301, 401, 63 Stat. 1051, 66 Stat. 758, 70 Stat. 188, 15 U.S.C. 714c; 7 U.S.C. 1441, 1447, 1421."

Barley Supplement, 22 Fed. Reg. 2973 (1957), states its authority as follows:

"Authority: §§ 421.2276 to 421.2286 issued under sec. 4, 62 Stat. 1070 as amended; 15 U.S.C. 714b. Interpret or apply sec. 5, 62 Stat. 1072, sec. 401, 63 Stat. 1054, sec. 308, 70 Stat. 206, 15 U.S.C. 714, 7 U.S.C. 1421, 1422."

Note and Loan Agreement, is specifically provided for by these regulations:

> "Applicable documents include the Producer's Note and Loan Agreement for warehouse-storage loans . . . ." [Barley Supplement, § 421.2277(d), 22 Fed. Reg. 2973].
>
> "(b) Warehouse-Storage Loans. Applicable forms shall consist of the Producer's Note and Loan Agreement and such other forms and documents as may be required by CCC." [Grain Bulletin, § 421.2207, 22 Fed. Reg. 2321].

Similarly, the regulations provide for the form of warehouse receipts to be delivered to the Commodity Credit Corporation:

> "Section 421.2279 Warehouse Receipts. Warehouse receipts representing barley in approved warehouse-storage to be placed under a loan or delivered under a purchase agreement, must meet the following requirements of this section:
>
> (a) Warehouse receipts must be issued in the name of the producer, must be properly endorsed in blank *so as to vest title in the holder*, and must be receipts issued by a warehouse approved by CCC under the Uniform Grain Storage Agreement which indicates that the barley is insured. . . ." [Barley Supplement; emphasis added.]

One of the Producer's Note and Loan Agreements involved in this case, and typical of all, may be found on pages 33 and 34 of the record. This document is like no instrument of loan known to the law. Unlike the loans with which lawyers, both as counsel and borrowers, are all too familiar, these do not have to

be repaid.[26] And if not repaid, there is no interest, another feature which the average banker would find surprising. The notion that the transaction is an ordinary loan with collateral security is further impinged on by § 421.2212 of the Grain Bulletin:

> "The producer shall not transfer either his remaining interest in or his right to redeem a commodity pledged as security for a warehouse-storage loan, nor shall anyone acquire such interest or right." [22 Fed. Reg. 2973]

The language of paragraph 9(b) of the Producer's Note and Loan Agreement is also of interest:

> "(b) If the Commodity Credit Corporation, or any other Federal agency, shall become the holder of the producer's note, it may, before or after maturity, move the pledged commodity from one storage point to another; turn, clean, or condition such commodity in any manner whatsoever; commingle such commodity or store it separately or otherwise; insure or reinsure such commodity against any risk; or otherwise handle or deal with such commodity as it may deem necessary or appropriate. . . ."

Mr. Justice Holmes once said, "The question is less what it is called than what it is."* The illusory nature

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[26] Paragraph 9 (a) of the Producer's Note and Loan Agreement provides as follows:

> "Any holder of the producer's note shall look solely to the pledged commodity for satisfaction of such note, plus charges and interest . . . ."

The Producer's Note is thus not a promissory note within the meaning of the negotiable instruments law, which requires an unconditional promise or order to pay a sum certain *in money*.

* *U. S.* v. *Storrs*, 272 U.S. 652, 654 (1926).

of this loan, and the restrictions on the right to redeem, have led one court to hold the Producer's Note and Loan Agreement to operate as a bill of sale rather than as a loan. *Maddox* v. *Bowers*, 149 N.E. 2d 248 (Ohio 1958).

Whether the instrument evidences a loan or a sale, petitioner here did something further. Petitioner delivered to Commodity Credit Corporation, prior to the tax date in California, a writing specifically quit claiming any interest it might be claimed to have.[27] The Chairman of the Agricultural Stabilization and Conservation Committee for California replied, stating in part that:

> "The Price Support Bulletin provides that 1957 barley loans in California mature on March 10, 1958, or on demand."[28]

But the language of § 421.2282 of the Barley Supplement is rather different, and would not appear to preclude a quit claim earlier than March 10.[29] Indeed, the regulations appear expressly to grant the producer a right of anticipation:

> "§ 421.2217 *Release of the Commodity under Loan.* A producer may *at any time* obtain release of the commodity remaining under loan by paying to the holder of the note and supplemental loan agreement or note and loan agreement the principal amount thereof, plus charges and accrued interest." [Grain Bulletin; emphasis added.]

[27] Record, p. 40. The quit claim is quoted supra, p. 10.

[28] Record, p. 43.

[29] The regulation is quoted on page 8 of this petition. The notice to petitioner stated that it had "*until* March 10, 1958, to either repay *or deliver the commodity* . . ." [Record, p. 39; quoted above, p. 9; emphasis added].

The petitioner does not ask this Court to make any ruling on the correct construction of these numerous regulations, or of the documents executed pursuant to them. But it is obvious that no decision on the merits in this litigation can be made except by construction of these regulations. And this is solely a federal question. Regulations are "little laws." As this Court stated in *U. S.* v. *Mersky*, 361 U.S. 431 (1960), "As we see it, a construction of the regulation necessarily is an interpretation of the statute." In that case this Court went on to state, "Once promulgated, these regulations, called for by the statute itself, have the force of law. . . ."[30]

In sum, the case at bar is a federal question case. It is not easy to see how it could be otherwise classified.

2. THE DECISION OF THE COURT OF APPEALS HAS CREATED A CONFLICT IN THE CIRCUITS AS TO WHETHER STATE OR FEDERAL LAW GOVERNS THE INCIDENTS OF COMMODITY CREDIT CORPORATION CONTRACTS.

The opinion of the Ninth Circuit in the case at bar is explicit:

> "The oft repeated and main objection of appellant has been and is that on the tax levy date it was not the owner of the taxed barley. Thereby is presented the one and only ultimate question to be decided in any court, whether state or federal. That question is . . . [not] federal in nature. . . ."[31]

[30] In *Mersky* the regulations involved concerned the labeling of foreign-made violins.

[31] Record, p. 80. It is scarcely possible to reconcile this with the language of *Allegheny:*

> "[T]heir [government contracts] consequences on the rights and obligations of the parties; the *titles* or liens which they create or permit, all present questions of federal law . . ." [Supra, p. 24; emphasis added].

Both the Third and Eighth Circuits have passed on this point, and both have announced rules to the contrary. In *U. S.* v. *Le Roy Dyal Co.*, 186 F. 2d 460 (3rd Cir. 1950) a Commodity Credit Corporation contract was at issue. The Court of Appeals for the Third Circuit held as follows:

> "The first question met is the law by which we are to be guided in deciding the case. Many New Jersey decisions have been cited to us. *We think it clear that they do not control.*" [Emphasis added.]

The Eighth Circuit spoke to the same effect in *U. S.* v. *McCabe Co.*, 261 F. 2d 539 (8th Cir. 1958). There also the controversy concerned the Commodity Credit Corporation. The Court stated as follows:

> "Appellants [the Government] assert that when the United States, acting pursuant to Constitutional acts of Congress, enters into large scale transactions requiring uniform administration, questions of rights and liabilities *must be uniformly determined by federal law.* The Supreme Court has consistently so held." [Emphasis added.]

The decision by the United States Court of Appeals for the Ninth Circuit in the case at bar is in direct conflict with these decisions from the Third and Eighth Circuits. The Ninth Circuit holds issues of interpretation presented by Commodity Credit Corporation contracts to be "no more federal in nature than are the incidents of land ownership derived from . . . federal land grants . . . ."[32] and on a record composed almost exclusively of Commodity Credit Corporation contracts and other documents concludes that "there is no sub-

[32] Record, p. 80.

stantial federal question involved in this case before us . . . ."[33] On the same type of record the Third Circuit held state decisions inapposite, and the Eighth Circuit was clear that all rights and liabilities arising from Commodity Credit Corporation transactions "must be uniformly determined by federal law."

The Commodity Credit Corporation enters into thousands of contracts throughout the United States each year. The conflict of decision as to the law governing interpretation of these contracts calls for resolution by this Court.

3. THERE IS MUCH CONFUSION AND CONFLICT IN THE CIRCUITS ON FEDERAL QUESTION JURISDICTION; THE TROUBLED STATE OF THE LAW URGENTLY SUGGESTS DECISION BY THIS COURT OF THE EXTENT AND BOUNDS OF THE JURISDICTION OF THE DISTRICT COURTS UNDER § 1331.

In 1946 this Court handed down its decision in *Bell* v. *Hood*, 327 U.S. 678. In that case Mr. Justice Black stated as follows:

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.[34] For this reason the district court has jurisdiction." [327 U.S. at 685]

[33] Ibid.

[34] This language in *Bell* v. *Hood* is very similar to the language of Chief Justice Marshall in the classic case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (U. S. 1825):

> "If it be a sufficient foundation for jurisdiction, *that the title or right set up by the party, may be defeated by one con-*

In its memorandum of decision the District Court stated only "that plaintiff asserts a claim arising under State law and within the general jurisdiction of the State courts."[35] This holding cannot subsist, in either principle or result, with the holding in *Bell* v. *Hood*:

> "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. * * * Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon and * * * does determine whether he will bring a 'suit arising under' the * * * [Constitution or laws] of the United States by his declaration or bill." [327 U.S. at 681].

Neither the District Court nor the Court of Appeals mentioned *Bell* v. *Hood* in their opinions.[36] The deci-

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construction of the Constitution of laws of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction." [Emphasis added.]

[35] Record, p. 62.

[36] Petitioner's counsel stated at the pretrial conference in the District Court that his primary reliance, insofar as jurisdiction was concerned, was being placed on *Bell* v. *Hood*. [Record, p. 67.] The record reveals that the Chief Judge examined *Bell* v. *Hood* during the course of that hearing, and agreed "it would appear that this court does have jurisdiction . . . ." [Record, p. 70] In its briefs before the Ninth Circuit the petitioner stated.

"This appellant will place its entire reliance in this appeal

sion in this case cannot be reconciled with *Bell* v. *Hood*. Here, again, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

There is also now a conflict in the Circuits on the nature and extent of federal jurisdiction under § 1331. The Second Circuit has followed *Bell* v. *Hood*. See *Fielding* v. *Allen*, 181 F. 2d 163 (2d Cir. 1950). The Ninth Circuit holding in the case at bar is in direct conflict, as is its holding in *Johnston* v. *Earle*, 245 F. 2d 793 (9th Cir. 1957).

The legal periodicals reveal considerable controversy as to this problem. See London, *Federal Question Jurisdiction—A Snare and A Delusion*, 57 Mich. L. Rev. 835 (1959), in which *Bell* v. *Hood* is discussed under the heading, "The Inexorcisable Ghost." Petitioner cannot agree that the principle of *Bell* v. *Hood* is a ghost to be exorcised, but petitioner is in emphatic agreement with the learned author that, unless clarified, "this subject will continue to be a trap for the wary and the unwary, indiscriminately."[37]

---

on *Bell* v. *Hood*, 327 U. S. 678 (1946), which is the most recent full discussion by the Supreme Court of federal question jurisdiction. That case also arose from the Southern District of California, and, as here, the District Court dismissed for lack of jurisdiction. A comparison of the pleadings in the two cases will reveal that the present litigation is infinitely more federal in origin and substance."

[37] 57 Mich. L. Rev. at 862. The following articles display additional points of view on federal question jurisdiction: Forrester, *The Nature of a Federal Question*, 16 Tulane L. Rev. 362 [in which it is pointed out that the floor manager for the Act of 1875 in the Senate understood the phrase "arising under" in the bill to have the same meaning as the corresponding language in Article III of the Constitution]; Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 Mich. L. Rev. 17; Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90 Penn. L. Rev. 639.

In *Osborn* v. *Bank of the United States, supra,* Chief Justice Marshall spoke of federal question jurisdiction as "that most important class of cases, which depend on the character of the cause. . . ." Whether or not the policy be one of contraction,[38] surely it is of first importance that the bounds and limits of federal question jurisdiction be clearly defined for the Bar to see, and that the present confusion and controversy on the subject be resolved.

CONCLUSION

There is compelling need for this Court to speak authoritatively on federal question jurisdiction, and to settle the issues which pervade the subject. In the face of the Ninth Circuit's decision in this case, no lawyer can advise a client to file a general federal question case with any degree of confidence. This branch of jurisdiction is replete with conflicts in the cases, and

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[38] The policy of contraction as such has received no comfort from Mr. Chief Justice Warren, who, in addressing the annual meeting of the American Law Institute, spoke of the study being undertaken of the jurisdiction of United States District Courts. In the course of his remarks the Chief Justice made the following statement:

> "I am particularly glad that the study will not center upon the question of 'What cases can Federal courts get rid of', but rather, 'What cases should they handle?' That affirmative approach—embracing both Federal question and diversity jurisdiction—should be very productive." [25 F. R. D. 213, 217]

A contraction of federal jurisdiction so severe as to send this case to the state courts should also be gauged by the criterion set forth in Mr. Justice Douglas' dissent in *Martin* v. *Creasy*, 360 U. S. 219 (1959):

> "As a general rule . . . the federal courts should be responsible for the exposition of federal law."

scholarly opinion reflects these divisions. The decision also has created a conflict between the Ninth Circuit, on the one hand, and the Third and Eighth Circuits, on the other, as to whether state or federal law governs the contracts of the Commodity Credit Corporation. In addition, the Court of Appeals has decided a federal question in a way in conflict with two applicable decisions of this Court, *Bell* v. *Hood*, 327 U.S. 678 (1946), and *U. S.* v. *Allegheny County*, 322 U.S. 174 (1944). For the foregoing reasons a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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March, 1961

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,740
Dec. 20, 1960

SALYER LAND COMPANY, *Appellant*,

v.

THE COUNTY OF KINGS, *Appellee*.

Appeal from the United States District Court for the Southern District of California, Northern Division

Before: BARNES and JERTBERG, Circuit Judges and BOWEN, District Judge

BOWEN, District Judge:

In 1957 appellant obtained a barley crop loan from the Commodity Credit Corporation (hereinafter CCC) and executed in its favor a note and loan and warehouse receipts pledge agreement. A California state law in effect in 1958 imposed for that year a personal property tax on stored barley against those who owned the barley on the tax levying date. Appellant timely filed its verified statement of property owned by it on the 1958 tax levying date, omitting therefrom 34,865 tons of the appellant's warehoused and pledged barley.

Respecting that barley, before the tax-levying date, appellant delivered its purported loan nonpayment intent notice

and its purported surrender and quitclaim of its title to the CCC which promptly repudiated that action on appellant's part, because appellant did not comply with the agreed conditions of loan maturity acceleration and of title surrender.

On the tax levying date and before the agreed loan maturity date, but subsequent to appellant's purported notice of loan nonpayment intent and purported quitclaim and title surrender, appellee Kings County levied a $27,182.61 tax under that California State law against appellant as the owner of the 34,865 tons of barley. Appellant under protest paid the tax and pressed for refund before the proper local taxing authority which, acting for appellee, refused to refund the tax. Appellant did not, as it might under state law have done, sue for the tax recovery in the state court, although its doing so is not prerequisite to its litigating in a federal court its valid federal question if it has any.

Instead of suing in state court, appellant brought this action in the United States District Court for the Southern District of California, Northern Division, to recover the tax, basing federal court jurisdiction and its right to its claimed state tax refund upon its contention that, by virtue of its purported loan nonpayment intent notice and its purported surrender and quitclaim of title to, and because of the provisions of the loan and pledge agreement with the CCC, appellant did not own the barley on the tax levying date and so was not liable for the tax, and that that question must be determined by the provisions of the federal law and regulations and the loan and pledge agreement made thereunder. Appellant further contends that the action of the state taxing authority deprived appellant of due process and equal protection of the law guaranteed to it under the United States Constitution and laws.

The CCC is not a party and has not appeared in this action. It is agreed that the CCC has not at any time opposed the tax levy and does not here assert any right or

claim for relief respecting any matter in suit. It does not now appear how the determination of any present issue in this case would be adverse to any interest of the CCC.

At the pretrial proceedings in the case one district judge entered a pretrial order, but with apparent misgivings as to the sufficiency of the facts then pleaded directed that a final statement of facts and briefs of counsel be prepared and filed, and allowed the case to remain in the District Court for trial. Later, in the course of making arrangements for the trial on the merits in that Court, and upon final consideration of the record as then made, another district judge for the same District Court of his own motion entered a final order dismissing this action for lack of federal court jurisdiction.

From that dismissal, appellant prosecutes this appeal asserting jurisdiction in the District Court under the provisions of Title 28 U.S.C., § 1331. This Court has jurisdiction under Title 28 U.S.C., § 1291.

Appellant makes no claim that the state court has refused or will refuse it lawful judicial review of its contentions respecting any aspect of the tax question, nor that the state court will not afford it due process or equal protection of the law in a suit there for the tax refund, nor that the state law has not been applied alike to, or is not applicable to, or is unconstitutional as to, other farmers who on the tax levy date were taxpaying barley owners. Appellant's only substantial contention is that because of the provisions of the loan agreement made pursuant to federal law and regulations it was not on the tax levying date the owner of the questioned taxed barley and so was not taxable under the state law.

The primary, direct and dominant issues in this case must be determined by the California state tax law, including as the principal issue whether this tax is applicable

to appellant taxpayer under the terms and provisions of that state law, rather than by the federal law which here concerns not the validity or applicability of the state tax as to barley owners but only the incidental question whether the appellant itself was on the tax levy date the owner of the barley taxed against appellant under the state law.

Furthermore, in its pleadings and pretrial order contentions appellant alleges no facts but only its bare conclusions as to lack of due process and inequality of the law as to it. In its briefs and at the oral argument on this appeal, appellant has not shown or contended that by any substantial basic specific facts it individually or as one of a class arbitrarily subjected to the tax has been intentionally, unfairly or unequally with others singled out in the enactment or application of the assailed state tax. No objection is made as to the state legislative enactment of the law or the procedures of levying the tax against appellant or other barley owners.

The oft repeated and main objection of appellant has been and is that on the tax levy date it was not the owner of the taxed barley. Thereby is presented the one and only ultimate question to be decided in any court, whether state or federal. That question is no more federal in nature that are the incidents of land ownership derived from the countless federal land grants referred to by this Court in the copyright mortgage foreclosure case of Republic Picture Corp. v. Security-First Nat. Bank, 197 F.2d 767, 9 Cir., 1952. There, at page 769, this Court said:

> "• • • It is not just because a right has its origin in federal law that a federal court has jurisdiction over matters which grow from that right. A large number of land titles in this country originate with a grant from the United States of America. Yet no one would now seriously claim that federal courts had authority to hear and decide litigation involving disputes among

persons claiming the land because of the original grant by the United States."

In this Court's earlier case of Marshall v. Desert Properties Co., 103 F.2d 551, 9 Cir., 1939, cert. den. 84 L. ed. 473, it was held that an action of the nature of one to quiet the plaintiff's title to certain mining claims against the adverse mining claims of defendant, where both of the conflicting claims were based upon federal mining laws, was not a case involving a federal question to be adjudicated by a federal court.

In Puerto Rico v. Russell & Co., 288 U.S. 476, it was held that no federal question necessary to federal court jurisdiction was involved in a suit by Puerto Rico to recover assessments levied on respondent's lands pursuant to an act of the territorial legislature of Puerto Rico, merely because the authority for making the law authorizing the assessments was granted by federal law. See also Gully v. First National Bank, 299 U.S. 109; California Water etc. Co. v. Redding, 304 U.S. 252, 255; Walter P. Villere v. Blinn, 156 F.2d 914, 5 Cir., 1946.

We believe there is no substantial federal question involved in this case before us, and that the District Court's dismissal of it was correct.

We have considered the cases cited and relied upon by appellant, but believe they are not in point and do not control the decision of this case.

The District Court's dismissal of this case is AFFIRMED.

(Endorsed) Opinion
Filed Dec. 20, 1960
FRANK H. SCHMID, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,740

SALYER LAND COMPANY, *Appellant*,

v.

THE COUNTY OF KINGS, *Appellee*.

Appeal from the United States District Court
for the Southern District of California,
Northern Division

Judgment

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

IT IS FURTHER ORDERED and adjudged by this Court that the appellee recover against the appellant for its costs herein expended and have execution therefor.

(ENDORSED) Judgment
Filed and entered: December 20, 1961
FRANK H. SCHMID, Clerk

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SUPREME COURT, U.S.
FILED
JAMES R. BROWNING, CLERK

In the Supreme Court of the United States

Brief for Respondent in Opposition

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OCTOBER TERM, 1960

No. 832

SALYER LAND COMPANY, *Petitioner,*

vs.

COUNTY OF KINGS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

THE QUESTION

Whether the complaint filed in the United States District Court affirmatively states a substantial federal question to thereby establish federal court jurisdiction.

THE CONSTITUTIONAL PROVISION AND FEDERAL STATUTE WHICH THE CASE INVOLVES.

The Constitution of the United States, Amendment XIV, Section 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the law."

Section 1331 of Title 28 of the United States Code:

"(a) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

STATEMENT

Appellant adopts the opinion of the United States Court of Appeals for the Ninth Circuit for an accurate statement of all material facts.

ARGUMENT

1. The Complaint, and the Cause Initiated by It, Does Not State a Federal Question Within the Jurisdiction of the United States District Court.

Briefly stated, this court is asked to determine whether the complaint filed in the United States District Court stated a cause of action arising under the Constitution, laws or treaties of the United States. Two federal courts, the District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit, have concluded that it does not.

The dominant issues raised by the pleading concern the validity and application of the law of the State of California as it relates to the taxation of personal property. The ultimate question to be determined on the merits of the case is whether the petitioner was properly taxed pursuant to the terms and provisions of the state tax law. An incidental question is the ownership of the property. Although necessarily involved in an analysis of the applicability of the state law, the determination of this point is a subordinate issue.

Neither the Commodity Credit Corporation or any other federal instrumentality is a party to the action, and no appearance has been filed on their behalf. No rights or interests of the United States or of any federally created agency are involved. Such rights or interests cannot be affected by the litigation.

The tax imposed by the County was exacted from a citizen of the state of California. It was based upon personal property within the County of Kings on tax levy date. At no time has the County asserted that the United States or any governmental agency through which it acts, is subject to the state property tax in question.

The federal statutes and regulations which relate to the administration of the federal price support program do not bear upon the issue of whether or not petitioner has affirmatively set forth a federal question, and such is the sole issue presented by the petition. Federal laws and regulations are involved in the controversy on the merits to the limited extent that the commodity price support program, announced by the Secretary of Agriculture, is the origin of the Producer's Note and Loan Agreement between the petitioner and the Commodity Credit Corporation. Such laws and regulations, however, relate only to the subordinate question whether petitioner was on tax levy date the owner of the barley taxed under the laws of the state of California, and not to the validity or applicability of the tax.

Although petitioner contends a constitutional question has been raised, the assertion is made without factual support in the complaint. Petitioner does not contend that it has been or will be denied judicial review by established state procedures, nor does it contend that orderly state procedures for the recovery of taxes erroneously or illegally imposed are lacking. In *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526, 537-548, it was held that the Con-

stitution of the United States is satisfied if an opportunity is given to question the validity of a tax either before the amount is determined or in subsequent proceedings for its collection.

In *Davidson v. New Orleans*, 96 U.S. 97, 104, the court stated:

> "That whenever by the laws of a state, or by a state authority, a tax assessment, servitude, or other burden is imposed upon property for the public use; whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however, obnoxious it may be to other objections."

Petitioner has pleaded no facts to establish the tax was not applied uniformally.

2. The Decision of the Court of Appeals for the Ninth Circuit Has Not Created a Conflict in the Circuits as to Whether State or Federal Law Governs the Incidents of Commodity Credit Corporation Contracts.

The California state law relating to the taxation of personal property is not inconsistent with any known or cited federal law, nor is it at all inconsistent with the agreement between petitioner and the Commodity Credit Corporation. This suit does not involve conflicting rules of ownership. Reduced to its simplest import it is purely a local tax refund case not affecting the United States in any of its rights or duties.

The decision by the United States Court of Appeals for the Ninth Circuit in the case at bar was that there is no substantial federal question involved, and that the District

Court's dismissal of it was correct. Respondent believes that this decision is not in conflict with either *U.S. v. LeRoy Dyal Co.* 186 F2d 460, (3rd Cir. 1950) or *U.S. v. McCabe*, 261 F2d 539, (8th Cir. 1958).

In the *Dyal*, and *McCabe*, cases, supra, federal jurisdiction was exclusive and incontrovertible,[1] for in both actions suit was filed by the United States as the real party in interest in contracts entered into by the Commodity Credit Corporation. In the instant case, federal jurisdiction is lacking for two reasons: first, it has not been conferred by statute as is the case wherein a federal agency is a party plaintiff or defendant, and second, no substantial federal question has been stated in the complaint.

Petitioner has confused two separate and distinct issues, one represented by the *Dyal* and *McCabe* cases, and the other by the case at bar.

The decisions of the Third (*Dyal*) and the Eighth (*McCabe*) Circuits, which petitioner argues are at odds with the decision of the Ninth Circuit, had to do with the issue as to whether state or federal law should be the federal rule. The issue raised in the Ninth Circuit decision is whether the United States District Court had jurisdiction of the case as one presenting a substantial federal question.

U.S. v. LeRoy Dyal, was an action by the United States to recover liquidated damages provided for by a contract

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1. 15 U.S.C. 714 b (c):

"... The district courts of the United States, including the district courts of any Territory or possession, shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation: Provided, That the Corporation may intervene in any Court in any suit, action, or proceeding in which it has an interest ... Any suit by or against the United States as the real party in interest based upon any claim by or against the Corporation shall be subject to the provisions of the subsection (c) of this section to the same extent as though such suit were by or against the Corporation ...

between the defendant and the Commodity Credit Corporation. State law relating to the validity of the liquidated damage provision was declared inapplicable in view of the principle declared in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (9th Cir. 1942). In the latter case it was stated that the application of state law would subject the rights and duties of the United States to exceptional uncertainty.

In U.S. v. McCabe, the issue was whether state legislation controlled so as to wipe out a cause of action in favor of the United States given by the Commodity Credit Corporation contract. It was an action by the United States to recover damages for conversion of grain upon which the Commodity Credit Corporation held warehouse receipts. Had state law been adopted as the federal rule, a substantial right of the United States would have been defeated.

In neither the Third or the Eighth Circuit case was there any question whatever as to whether the complaint and the cause initiated by it presented a substantial federal question to be decided by the federal court. But this is the precise question presented for review in the case now before the Supreme Court.

3. Bell v. Hood Is Not Inconsistent with the Holding of the District Court and Court of Appeals.

Petitioner has placed great emphasis upon the Court's opinion in *Bell v. Hood*, 327 U.S. 678. It seems to urge that the language of the opinion is so broad as to permit a pleader to bring a case within the jurisdiction of a federal court by so drafting the initial pleading as to require the Constitution or a federal law to be interpreted in the course of decision. In the judgment of respondent, the case does not support such a conclusion.

In *Bell v. Hood*, plaintiff sought recovery squarely on the constitutional guarantees contained in the Fourth and Fifth Amendments to the Constitution of the United States. It was the purpose of the pleader to make the alleged violations the basis of the action. Whether petitioners in *Bell v. Hood* were entitled to recover damages depended upon an interpretation of the Constitution. The Court declared that it is the right of the pleader to select the law upon which he will rely for recovery. That an action might have been commenced in a state court, is no bar to a federal action if the basic issue raised by the complaint turns on a "federal question." The Court did not alter the long established rule requiring an affirmative statement of the substantial "federal question" involved in the controversy.

In *Gully v. First National Bank*, 299 U.S. 109, Justice Cardozo clarified the test to be used to determine what constitutes a "federal question." The rule is that to bring a case in the federal court by reason of the existence of a "federal question," a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. This rule has not been restricted or abrogated by *Bell v. Hood*.

Neither the District Court nor the Court of Appeals mentioned *Bell v. Hood* in their opinions. Such mention was not necessary, for both courts clearly stated the cause set forth in the complaint did not have as its primary, direct and dominant issue, a right or immunity created by the Constitution or laws of the United States. In the absence of such issue, no substantial federal question has been raised by the complaint. *Bell v. Hood* does not bear upon the issue presented by the petition herein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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April 18, 1961

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MAY
JAMES R. BROWNING, Clerk

No. 832

Supreme Court of the United States

OCTOBER TERM, 1960

SALYER LAND COMPANY,
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v.

THE COUNTY OF KINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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May, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

No. 832

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

The issue in this case is the ownership of 34,865 tons of barley, and it has isolated for presentation the fundamental problem of when federal question jurisdiction attaches in a definitive way not often to be seen. For the issue is whether petitioner owned the barley, or whether the federal government owned it. All of the contracts upon which that issue of title is to be determined are between petitioner and the federal government. And, as we have been told by this Court,

> "The . . . construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the *titles* . . . which they create or permit, all present questions of federal law not controlled by the law of any state." *U. S. v. Allegheny County*, 322 U.S. 174, 182 (1944). [Emphasis added].

Are the "questions of federal law" spoken of in *Allegheny*, "federal questions", such as will support jurisdiction under 28 U.S.C. § 1331?

The brief of the respondent provides no assistance in the consideration of this problem. It may perhaps be summarized in its bald statement that,

> "An incidental question is the ownership of the property."[1]

The Court of Appeals itself has exposed this fallacy:

> "The oft repeated and main objection of appellant has been and is that on the tax levy date it was not the owner of the taxed barley. Thereby is presented *the one and only ultimate question* to be decided in any court, whether state or federal." [Emphasis added].

Here is a case whose raw materials are contracts between the petitioner and the government. Presumably they are to be controlled by federal law. *U. S.* v. *Allegheny County*, supra;[3] *U. S.* v. *McCabe Co.*, 261 F. 2d 539 (8th Cir. 1958); and *U. S.* v. *LeRoy Dyal Co.*, 186 F. 2d 460 (3rd Cir. 1950). Something more is then added. The contracts are in a form prescribed by fed-

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[1] Respondent's brief, p. 2.

[2] Page 4a of the petition for certiorari. The opinion below has now been reported. Salyer Land Company v. County of Kings, 285 F. 2d 481 (9th Cir. 1960). There is not now, and never has been, any question in this case concerning the validity or construction of California tax law, or of procedures thereunder. See the discussion between the Court and counsel at pp. 64-70 of the Record, pp. 18-19 of the petition for certiorari.

[3] In the petition for certiorari petitioner stated that the decision below is in conflict with *Allegheny*. Significantly, respondent county in its brief in opposition has not mentioned *Allegheny*.

eral regulations, and are entered into by the Commodity Credit Corporation with thousands of different persons throughout the United States. The Congress, in granting authority for the making of those contracts, specifically provided that they are not to be controlled by state law.[4] Does the determination of an issue of title arising out of those contracts provide a question of state or of federal law? If it be the latter, does that federal question support jurisdiction of the U. S. District Court under 28 U.S.C. § 1331? These questions, which so clearly appear to call for affirmative answers, are answered in the negative by the decision below.

Whether we turn to the classic statements in *Osborn* v. *Bank of United States,* or to the literary excellence of Mr. Justice Cardozo's opinion in *Gully* v. *First National Bank,* 299 U.S. 109 (1936),[5] or to this Court's more recent holding in *Bell* v. *Hood,* 327 U.S. 678 (1946), the practicing attorney does not know when federal question jurisdiction attaches, the trial courts cannot be sure, and the scholars have made clear their uncertainty.

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[4] 15 U.S.C. § 714b (g).

[5] The oft quoted statement from *Gully* is:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

See Hart & Wechsler, The Federal Courts and the Federal System, where the authors say, at page 765, "Is this statement helpful? Is it accurate?"

Mr. Justice Frankfurter, speaking for this Court in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959), stated that

> ". . . [O]nly if the applicable law is 'federal' law would jurisdiction be proper under § 1331." [358 U.S. at 376].

Can we not conclude from this, that if the applicable law *is* federal, jurisdiction under § 1331 is proper?

The learned authors of Hart and Wechsler, *The Federal Courts and the Federal System*, after a thorough exploration of the problem, say this:

> "Would it be sound to conclude that an action arises under federal law, for the purposes of statutory grants of original district court jurisdiction, if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law—whether that proposition is independently applicable or becomes so only by reference from state law?"[6]

But the statement is in question form, as discussions of the subject must be unless this Court provides the answer. It is respectfully submitted that the petition for certiorari should be granted.

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[6] At page 769.